(20,677.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 288.

THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

SID WILSON.

IN ERROR TO THE CORPORATION COURT OF THE CITY OF RADFORD, STATE OF VIRGINIA.

INDEX.

	Original.	Print.
Caption	1	1
Declaration	1	1
Judgment	4	3
Bill of exceptions No. 1	5	4
Special plea No. 1	6	4
Bill of exceptions No. 2	8	5
Instructions given	8	5
Instructions refused	9	6
Instructions of the court	10	6
Bill of exceptions No. 3	11	7
Testimony of Sid Wilson	11	8
J. W. Dudley	12	8
P. C. Winborn	12	8
J. T. Dixon	12	8
A. B. Cord	12	8
Rules 20 and 24	13	9
Verdict	13	9
Motion for new trial	14	9
Judge's certificate	14	9

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1907.

	Original.	Print.
Clerk's certificate	15	10
Memorandum by the clerk	16	10
Pleas	16	10
Assignment of errors	18	11
Petition for writ of error	19	11
Writ of error	20	12
Citation	22	13
Acceptance of service of citation	23	13
Bond on writ of error	24	13
Order for return to writ of error	26	15
Certificates of clerk and judge	27	15

1 RECORD.

Pleas Before the Corporation Court of the City of Radford, at the Court House Thereof, on Thursday, February 14th, 1907.

Be it remembered that heretofore, to-wit, at Rules held in the Clerk's Office of the said Corporation on the third Monday in April, 1906, came Sid Wilson, by his attorney H. C. Tyler and filed his declaration against the Western Union Telegraph Company of a plea of debt on penal Statute $100.00, which declaration is in the following words and figures, to-wit:—

Declaration.

VIRGINIA:

Corporation Court, City of Radford, To-wit:

To 2nd April Rules Thereof, 1906.

Sid Wilson complains of the Western Union Telegraph Company, a corporation, of a plea that he rendered unto it the sum of one hundred ($100.00) dollars which to him it owes and from him unjustly detains, for this, to-wit: that heretofore, to-wit: on the 7th day of August, 1905, the said defendant was a Telegraph Company, doing business in the State of Virginia, and was the owner and operator of a certain Telegraph line running from its office at Graham, Tazewell County, Virginia, to East Radford, Virginia, and the said plaintiff on the day and year aforesaid, delivered to the said defendant at its telegraph office at Graham Virginia, aforesaid and the said defendant then and there received from the said plaintiff a telegraphic dispatch in substance in the words and figures following, to-wit:

2 GRAHAM, VA., 8/7/5.

"Post Master, East Radford, Va.:

Phone Corbett to relieve me on arrival of train 2.

(Signed) SID WILSON."

And the said plaintiff then and there paid to the said defendant, and the said defendant then and there received from the said plaintiff the usual charges for such messages, according to the regulations of the said Company for the transmission and delivery of the dispatch aforesaid; and it was the duty of the said Company to transmit the said dispatch from its office at Graham, Virginia, to its office at East Radford, Virginia, faithfully and impartially, and as promptly as practicable and in the order of its delivery to the said Company by said plaintiff; but the said defendant not regarding its duty in this behalf, negligently, improperly and unlawfully and contrary to the form of the statute in such cases made and provided,

then and there failed to transmit said dispatch from its office at Graham, Virginia, to its office at East Radford, Virginia, faithfully and impartially and as promptly as practicable and in the order of its delivery to said Company; such failure to transmit said dispatch extended over a long space of time, to-wit: the space of about five hours, so long in fact that it could not possibly have been of any use to the said plaintiff, and this fact was well known to the said defendant, whereby and by reason of the statute in such cases made and provided, an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of $100.00 above demanded:

And for this also, to-wit:

That heretofore, to-wit: On the 7th day of August, 1905, the said defendant was a Telegraph Company doing business in the State of Virginia, and was the owner and operator of a certain telegraph line running from its office in Graham, Tazewell County, Virginia,
to East Radford, Virginia, and has telegraphic offices for the
3 reception, transmission and delivery of dispatches at said
office at Graham, Virginia, and East Radford, Virginia, and the said plaintiff on the day and year aforesaid delivered to the said defendant at its telegraph office at Graham, Virginia, and the said defendant then and there received from the said plaintiff, a telegraphic message in substance in the words and figures following, to-wit:

GRAHAM, VA., 8/7/5.

"Post Master, East Radford, Va.:

Phone Corbett to relieve me on arrival of train 2.

(Signed) SID WILSON."

And the said plaintiff then and there paid to the said defendant, and the said defendant then and there received from him the usual charges for such messages according to the regulations of the said Company for the transmission and delivery of the dispatch aforesaid, and the said defendant transmitted the same to its office at East Radford, Virginia, at which office the said dispatch arrived, and the regulations of the said defendant at its office at East Radford, Virginia, required the delivery of the said dispatch promptly to the person to whom it was addressed, to-wit: to the said Post Master at East Radford, Virginia, whereby and by virtue of the statute in such cases made and provided it became and was the duty of the said defendant upon the arrival of the said dispatch at its office at East Radford, Virginia, to deliver the same as promptly as practicable to the said Post Master at East Radford, Virginia, to whom it was addressed; but the said defendant, not regarding its duty in this behalf, negligently, improperly and unlawfully, and contrary to the form of the statute in such cases made and provided, then and there did not deliver the said dispatch upon its arrival at its office at East Radford, Virginia, as promptly as practicable to the said Post Master at East Radford, Virginia, but negligently and unnecessarily delayed

the delivery of the same; whereby and by reason of the statute
4 in such cases made and provided an action hath accrued to the plaintiff to demand, and have of and from the defendant the said sum of $100.00 above demanded.

Yet the said defendant, although often requested, hath not paid to the said plaintiff the said sum of $100.00 above demanded, or any part thereof, but the same to pay hath hitherto neglected and refused and still doth neglect and refuse, to the damage of the plaintiff $100.00, and therefore he brings his suit.

H. C. TYLER, *p. q.*

Judgment.

And now at this day, to-wit:—At a Corporation Court, held for the said City of Radford at the court house thereof on Monday, February 25th, 1907, the following order was entered.

SID WILSON, Plaintiff,
vs.
WESTERN UNION TELEGRAPH CO., Defendant.

Debt per Statute.

This day came the parties by their Attorneys and announced ready for trial. And the defendant by Counsel offered a Special Plea in writing, which was objected to by the plaintiff and rejected by the Court, And thereupon came a Jury, to-wit:—C. W. Myers, E. E. Shanklin, G. L. Rison, H. P. Anderson, R. A. Roop, W. B. Lyons and W. S. Surface, who being elected, tried and sworn, the truth to speak upon the issue joined and having fully heard
5 the evidence and receiving the instructions of the Court and argument of Counsel, retired to their room and after a short time returned into Court having found the following verdict, to-wit:

"We the Jury find for the Plaintiff and assess the Penalty $100.00.
W. S. SURFACE, *Foreman.*"

Whereupon the defendant moved the Court to set aside the said verdict as being contrary to the law and evidence. And the Court having fully considered the said motion, does overrule the same and direct Judgement be entered for the plaintiff in accordance with the verdict of the Jury. It is therefore considered by the Court that the plaintiff recover of the defendant the sum of One Hundred Dollars, the amount ascertained by the Jury with interest from this date, and all his costs about his suit in this behalf expended. As the said defendant by Counsel expressed an opinion to repeal the case, an Execution is suspended for sixty days from the rising of this Court.

Memorandum.

On the trial of this cause the defendant offered the following Special Plea in writing which was objected to by the plaintiff and rejected by the Court, to-wit:

SID WILSON
v.
WESTERN UNION TELEGRAPH CO.

Bill of Exceptions No. 1.

Be it remembered, that upon the trial of this cause and
6 before the jury was sworn, the defendant, by counsel, moved the court to be allowed to file its special plea, No. 1, which is ereto attached and made a part of this bill of exceptions. But upon ojection by plaintiff the court overruled said motion and refused o allow said plea to be filed, to which action and ruling of the court he defendant by counsel excepted, and tendered this its bill of exception No. 1 and prayed that the same might be signed, sealed and made a part of the record which is accordingly done.

G. E. CASSEL. [SEAL.]

SID WILSON
vs.
WESTERN UNION TELEGRAPH CO.

Special Plea No. 1.

And the said defendant comes and says that, at the time the dispatch in the declaration mentioned was delivered to it at Graham in the State of Virginia, to-wit, on the 7th day of August, 1905, to be transmitted to East Radford in the State of Virginia, the only proper and regular route which the defendant had on the day last aforesaid for transmitting said dispatch from Graham in the State of Virginia, to East Radford in the State of Virginia, was by transmitting the said dispatch from Graham in the State of Virginia to Bluefield, West Virginia and thence through various offices of said defendant to Washington in the District of Columbia, where the said defendant has a relay office and thence relaying and from that point transmitting said dispatch to East Radford in the State of Virginia, and therefore, the dispatch was transmitted by the defendant from
7 Graham in the State of Virginia to the City of Washington in the District of Columbia, a point outside of and beyond the jurisdiction and territory of the State of Virginia, where said dispatch was delayed, and the defendant avers that it did faithfully and impartially and as promptly as practicable and in the order of its delivery to the defendant (at Graham in the State of Virginia) transmit said message or dispatch from Graham in the State of Virginia, to its said office in the City of Washington in the District of Columbia (on its journey or voyage to East Radford

in the State of Virginia) for the purpose of transmitting said dispatch through and from the defendant's said relay office in said City of Washington in the District of Columbia to East Radford in the State of Virginia; but said defendant further avers that although the said dispatch was faithfully and impartially and as promptly as practicable and in order of its delivery to the defendant at Graham in the State of Virginia, transmitted by the defendant from Graham in the State of Virginia to the City of Washington in the District of Columbia and promptly received by the defendant at the last named place and there by the defendant taken from its wires and written out to be relayed and transmitted to East Radford in the State of Virginia; that said dispatch was by said defendant delayed in the City of Washington and was by mistake transmitted to Cincinnati causing a delay in the transmission of said dispatch from the said City of Washington in the District of Columbia to East Radford in the State of Virginia.

Wherefore, by reason of the facts above set forth, the defendant says: that the transmission of the dispatch aforesaid was and is interstate commerce, and therefore, the Statute of Virginia (Section 5 Chapter 8 of an Act of the General Assembly entitled "An Act Concerning Public Service Corporations" approved January 18th, 1904) prescribing a penalty for which this action is brought, is, as applied to that part of the transmission of said dispatch which took place outside of the territorial limits of the State of Virginia, repugnant to Article 1, Section 8, paragraphs or sub-sections 3 and 18 of the Constitution of the United States, and is null and void as to the transmission of said dispatch in the declaration described, outside of the territorial limits of the State of Virginia; and the plaintiff cannot have from and of the defendant recover the penalty in his declaration demanded.

8

And all this the defendant is ready to verify.

Wherefore, it prays judgment etc.

ROBERTSON & WINGFIELD, *p. d.*

SID WILSON
vs.
WESTERN UNION TELEGRAPH CO.

Bill of Exceptions No. 2.

Be it further remembered that upon the trial of this cause, after the happenings of the matters set forth in Bill of Exceptions No. 1, and after the evidence had all been produced before the jury, which evidence is set forth in Bill of Exceptions No. 3, both of said Bills of Exceptions being hereby specifically referred to, and before the argument before the jury began, the plaintiff, by counsel, moved the court to instruct the jury as follows:

"The court instructs the jury that if they believe from the evidence that the defendant, the Western Union Telegraph Company accepted through its agent a message from Sid Wilson at Graham, Virginia, August 7th, 1905, as prepaid; that same was paid at its

office in Graham, Virginia, to be transmitted to its office at East Radford, Virginia, and further believe from the evidence that the said message was not transmitted faithfully and impartially
9 and as promptly as practicable and in the order of its delivery to the Company to its office at East Radford, Virginia, they must find for the plaintiff."

to the giving of which instruction, the defendant by counsel objected, and moved the court to give the following instructions:

(1.) "The Court instructs the jury that if they believe from the evidence that the message in the declaration mentioned was delivered to the defendant Company as a government message and paid for at a reduced rate as such, and if they further believe that such message was in relation to the private business of the plaintiff, they must find for the defendant; and if they believe from the evidence that the message was a government message on the business of the government, they must find for the defendant."

No. 2.

"The Court further instructs the jury that this is a suit upon a penal statute which is to be strictly construed and before he can recover in this action, he must prove all the facts necessary to his recovery to the satisfaction of the jury by clear, strong and convincing evidence."

No. 3.

"The Court instructs the jury that if they believe from the evidence that the dispatch in the declaration mentioned was delivered to the defendant or its agents, by the plaintiff and that the plaintiff did not pay to the defendant the charges established by it for the transmission of dispatches, but paid to the defendant a smaller sum, the plaintiff cannot recover for a delay in transmission of the dispatch."

No. 4.

"The Court further instructs the jury that if they believe from the evidence that the dispatch in the declaration mentioned was in relation to the official duties of the plaintiff, as an employee of the United States and entitled to be forwarded at Government rates, they must find for the defendant, even though they may further believe that the plaintiff was interested in the proper transmission of said dispatch."

NOTE.—Refused because there was, in the opinion of the Court, not sufficient evidence to show that the message in question "was in relation to the official duties *only* of plaintiff."

10 Thereupon, the Court gave the following four instructions:

No. 1.

"The Court instructs the jury that if they believe from the evidence that the defendant, the Western Union Telegraph Company accepted through its agent a message from Sid Wilson at Graham,

Va., August 7th, 1905, as prepaid; that same was paid at its office in Graham, Virginia, to be transmitted to its office at East Radford, Virginia, and further believe from the evidence that the said message was not transmitted faithfully and impartially and as promptly as practicable and in the order of its delivery to the Company to its office at East Radford, Virginia, they must find for the plaintiff."

No. 2.

"The Court instructs the jury that if they believe from the evidence that the message in the declaration mentioned was delivered to the defendant company as a government message and paid for at a reduced rate as such, and if they further believe that such message was in relation to the private business only of plaintiff, they must find for the defendant."

No. 3.

"The Court further instructs the jury that this is a suit upon a penal statute which is to be strictly construed, and before he can recover in this action, he must prove all the facts necessary to his recovery to the satisfaction of the jury by clear, strong and convincing evidence."

No. 4.

"The Court instructs the jury that if they believe from the evidence that the dispatch in the declaration mentioned was delivered to the defendant or its agents by the plaintiff and that the plaintiff did not pay to the defendant the charges established by it for the transmission of dispatches, but paid to the defendant a smaller sum, the plaintiff cannot recover for a delay in transmission of the dispatch."

to which action and ruling of the court in giving instruction No. 1 as offered by the plaintiff, and in modifying instruction No. 1 as offered by the defendant, and in refusing to give Instruction No. 4, as offered by the defendant, the defendant excepted and tendered this its second Bill of Exceptions and prayed that the same might be signed, sealed and made a part of the record, which is accordingly done.

G. E. CASSEL. [SEAL.]

11 SID WILSON
vs.
WESTERN UNION TELEGRAPH COMPANY.

Bill of Exceptions No. 3.

Be it further remembered that upon the trial of this cause, after the jury had been empanelled and sworn, the plaintiff, to sustain the issue on his part, and the defendant to sustain the issue on its part, introduced the following testimony; which evidence is as follows, to-wit:

Plaintiff's Evidence.

SID WILSON testified that on the 7th day of August, 1905, he was employed as a Postal Clerk by the United States Government on a train running between Lynchburg and Graham; that on that day a member of his family had died and he desired to attend the funeral; that when the train arrived at Graham he handed to the telegraph operator at Graham, about three o'clock P. M., a telegram as follows:—

"Post Master, East Radford, Va.:

Phone Corbett to relieve me on arrival of train 2.

SID WILSON."

Government Rate.

that this telegram was written in his own hand writing on the train and that with it he handed to the operator the sum of twenty cents and requested the operator to send the message at government rate; that his object in sending the message was partly for the private reason that he wanted to go to the funeral and partly for government purposes to enable the government to have someone to take his place on his arrival at Radford; that he had been in the habit of sending telegrams at government rates for a long time.

12 J. W. DUDLEY testified that on the 7th of August, 1905, he was postmaster at East Radford and that he received the message at 7 o'clock P. M. on the same day at the post office; that the post office and his residence are both in the corporate limits of East Radford; and that train No. 2 arrived at East Radford, and departed before the telegram reached him.

Evidence Offered by Defendant.

P. C. WINBORN Operator at Graham testified that he received the message about three o'clock P. M. and forwarded the same promptly from his office; that the plaintiff handed him the sum of twenty cents; that the regular established charges from Graham to East Radford for sending a message of ten words such as this one was, was twenty-five cents, but that the government rate was a reduced rate, and was twenty cents; and that he knew that Wilson was a postal clerk; that he understood it to be his duty to forward the message at government rate.

J. T. DIXON, Operator at East Radford testified that he received the message at a few minutes before seven o'clock on the same date and that he sent it out by a messenger as soon as he received it.

A. B. CORD testified that at the time the message was sent, he was manager of the office at East Radford and that he had been employed by the Western Union Telegraph Company for many years and in

various capacities; that the rule of the Company required him, when a message is tendered with the words "government rate" or
13 "official business" endorsed on the message, to forward the same at government rates, unless there are some suspicious circumstances in which case, he would make inquiries.

The rules of the Company were also introduced into evidence as follows:

Rule No. 20.

The rates established for the United States Government messages between Western Union offices in the United States will be found on pages 8, 9 and 10. As there indicated, these rates are for messages of 20 words or less address and signature counted.

Rule No. 24.

All messages offered for transmission at Government rates should be endorsed by the senders "official business."

On page 8 the government rate from Graham to East Radford is shown as twenty cents.

And this being all the evidence introduced by both parties, and after the court had instructed the jury as shown by defendant's Bill of Exceptions No. 2, which is hereby specifically referred to and made a part hereof, and after argument of counsel, the jury retired to their room and after some time, returned and brought in the following verdict:

"We, the jury, find for the plaintiff and assess the penalty One Hundred ($100.00) Dollars."

W. S. SURFACE, *Foreman.*

14 Thereupon, the defendant by counsel, moved the court to set aside the verdict of the jury and grant it a new trial on the following grounds:

1. Because the court had erred in rejecting the special plea offered by the defendant, and set forth in Bill of Exceptions No. 1, which is hereby specifically referred to.

2. Because the court had improperly instructed the jury as to the law.

3. Because the verdict was contrary to the law and the evidence.

But the court over-ruled said motion for new trial, and entered up judgment against the defendant for the sum found by the jury in its verdict; to which ruling of the court, the defendant by counsel excepted and tendered this its Bill of Exceptions No. 3, and prayed that the same might be signed, sealed and made a part of the record, which is accordingly done.

G. E. CASSEL. [SEAL.]

15 *Clerk's Certificate.*

I, M. M. Caldwell, Clerk of the Corporation Court of Radford City, Virginia, do certify that the foregoing is a true transcript and copy of the record of a suit of Sid Wilson against the Western Union Telegraph Company.

Given under my hand this the 28th day of March, 1907.

M. M. CALDWELL, *Clerk.*

16 MEMORANDUM.—Since this record has been made up in this case, the Attorney for the plaintiff has suggested that the follows pleas *has* been omitted and should be copied in said record, which were filed in the case on the 11" day of June 1906, prior to the trial of the case, towit:

(1.)

SID WILSON
vs.
WESTERN UNION TELEGRAPH CO.

The defendant says that the declaration and each count thereof is not sufficient in law.

ROBERTSON & WINGFIELD, *p. q.*

(2.)

SID WILSON
vs.
WESTERN UNION TELEGRA- —.

In Debt.

And the said defendant, by its attorneys, comes and says that it does not owe the sum of One Hundred ($100.00) Dollars, or any part thereof in manner and form as the said plaintiff hath thereof above complained, and of this, the said defendant puts itself upon the country.

ROBERTSON & WINGFIELD, *p. q.*

(3.)

SID WILSON
vs.
WESTERN UNION TELEGRAPH CO.

17 This day, come the parties by their attorneys, and on motion of the defendant, leave is granted it to file its demurrer and its plea of general issue in this case, which is accordingly done, and by consent of the parties, this cause is continued.

A copy—Teste.

M. M. CALDWELL, *Clerk.*

18 STATE OF VIRGINIA:

Corporation Court, City of Radford.

SID WILSON, Plaintiff,
against
THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

The Western Union Telegraph Company complains of the defendant and says that in the judgment and record rendered in the above entitled cause, the following errors were committed, which it assigns:—

1st. That the said Court erred in refusing to allow the defendant, The Western Union Telegraph Company to file its special plea, that the said message was transmitted through the District of Columbia on its way to its destination, and therefore, that said message was an interstate message and not subject to the provisions of the Virginia statute.

2nd. That the said Court erred in rendering judgment in favor of the plaintiff, when the said judgment should have been rendered for the defendant.

Wherefore, the defendant asks that the said judgment may be reversed, and it be restored to all things it has lost thereby.

RUSH TAGGART,
Attorney for the Western Union Telegraph Company.

18½ [Endorsed:] State of Virginia. Corporation Court. City of Radford. Sid Wilson, Plaintiff, against The Western Union Telegraph Company, Defendant. Assignment of Errors. (Copy.) Rush Taggart, Attorney for Def't W. U. Tel. Co., 195 Broadway, New York.

19 THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
vs.
SID WILSON, Defendant in Error.

To the Honorable Melville W. Fuller, Chief Justice of the United States:

The Western Union Telegraph Company considering itself aggrieved by the Judgment of the Corporation Court of the City of Radford of the State of Virginia in rendering Judgment against it in the above entitled case on the 25th day of February 1907, The Western Union Telegraph Company, Plaintiff in Error, hereby prays a writ of error and supersedeas from the said decision and Judgment to the Supreme Court of the United States. Assignment of errors is hereto attached.

THE WESTERN UNION TELEGRAPH COMPANY,
By RUSH TAGGART, *Its Counsel.*

20 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Corporation Court of the City of Radford, State of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Corporation Court of the City of Radford before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Sid Wilson, Plaintiff, and The Western Union Telegraph Company, Defendant wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitu-
21 tion, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said The Western Union Telegraph Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 10th day of April, in the year of our Lord one thousand nine hundred and seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

22 UNITED STATES OF AMERICA, *ss:*

To Sid Wilson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Corporation Court of City of Radford, State of Virginia wherein The Western Union Telegraph Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David J. Brewer, Associate Justice of the Supreme Court of the United States, this 10th day of April, in the year of our Lord one thousand nine hundred and seven.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

23 I hereby accept legal service of the within summons. This April 15" 1907.

H. C. TYLER,
Att'y for Sid Wilson.

24 237239.

Know all men by these presents, That we, The Western Union Telegraph Company, as Principal, and the American Surety Company of New York, as surety are held and firmly bound unto Sid Wilson in the full and just sum of Three Hundred Dollars to be paid to the said Sid Wilson, his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 3rd day of April in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at a Session of the Corporation Court of the City of Radford, State of Virginia in a suit depending in said Court, between Sid Wilson, Plaintiff and The Western Telegraph Company Defendant. State of Virginia, a judgment was rendered against the said The Western Union Telegraph Company and the said The Western Union Telegraph Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Sid Wilson citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within — days from the date thereof.

Now, the condition of the above obligation is such, That if the said The Western Union Telegraph Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to

make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of

THE WESTERN UNION TELEGRAPH COMPANY,
By R. C. CLOWRY, *President,*
Attest:
A. R. BREWER, *Secretary.*

AMERICAN SURETY COMPANY OF NEW YORK,
By R. R. BROWN, *Vice-President,*
Attest:
[L. S.] CORTLANDT S. VAN RENSSELAER, *Attorney.*

Approved by & to operate as supersedeas.
(Signed) DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

25 STATE AND COUNTY OF NEW YORK, *ss:*

On this 30" day of Apr. 1907, before me personally appeared R. R. Brown, Vice-President of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resided in the City of New York; that he is the Vice President of the American Surety Company of New York, the Corporation described in and which executed the above instrument; that he knew the corporate seal of said Corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by Law. And the said R. R. Brown, further said that he was acquainted with Cortlandt S. Van Rensselaer and knew him to be one of the Attorneys of said Corporation, that the signature of said Cortlandt S. Van Rensselaer subscribed to the said instrument, is in the genuine handwriting of the said Cortlandt S. Van Rensselaer and was thereto subscribed by the like order of the said Board of Directors, and in the presence of him the said R. R. Brown, Vice President.

[L. S.] HORACE P. HOLLISTER,
Notary Public, Westchester County.

Certificate filed in New York County.

At a regular quarterly meeting of the Board of Trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted and is still in force:

"Resolved, That the President and Vice-Presidents be and they hereby are, and each one of them is authorized and empowered to

execute and deliver, and attach the seal of the Company to any and all bonds and undertakings for, or on behalf of the Company, in its business of guaranteeing the performance of contracts other than insurance policies and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the Secretary, one of the Assistant Secretaries or one of the Attorneys."

COUNTY OF NEW YORK, *ss:*

I, Cortlandt S. Van Rensselaer Attorney of the American Surety Company of New York, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original Resolution.

Given under my hand and the seal of the Company at the City of New York, this 3rd day of Apr., 1907.

[L. S.] CORTLANDT S. VAN RENSSELAER, *Attorney.*

26 VIRGINIA:

In the corporation court held for the city of Radford, at the court house thereof on Saturday April 20" 1907, the following court order was entered.

SID WILSON, Plaintiff,
vs.
WESTERN UNION TELEGRAPH CO., Defendant.

Action of Debt.

It appearing to the court that the Honorable Melville W. Fuller, Chief Justice of the United States on the 10" day of April 1907, by his Associate Justice the Honorable David J. Brewer, in the Supreme Court of the United States, allowed a writ of error in a certain action of debt, lately depending in this court between Sid Wilson plaintiff and the Western Union Telegraph Company, defendant. In obedience to the said writ, it is ordered by the court that a full and complete transcript of the record and proceedings be sent to the Supreme Court of the United States at Washing- according to law, by the Clerk of this Court.

A copy.
Teste:

M. M. CALDWELL, *Clerk.*

27 STATE OF VIRGINIA, *City of Radford, To wit:*

I, M. M. Caldwell, Clerk of the Hustings or Corporation Court, of the city of Radford, in the State of Virginia, do hereby certify that the foregoing is a true transcript of the record and proceedings in a certain action of debt, lately depending in the said court

between Sid Wilson plaintiff and the Western Union Telegraph Company, defendant, with all things touching the same, as fully and wholly as they now exist among the records of my office.

In testimony whereof I hereunto set my hand and annex the seal of the said court, this the 20″ day of April 1907.

[Seal Hustings Court, City of Radford, Virginia.]

M. M. CALDWELL, *Clerk.*

VIRGINIA, *City of Radford, To wit:*

I, George E. Cassel, Judge of the Hustings or Corporation Court, of the city of Radford, in the State of Virginia do certify that M. M. Caldwell, who has given the preceding certificate, is clerk of the said court, and that his attestation is in due form.

Given under my hand the 20″ day of April 1907.

GEO. E. CASSEL, *Judge.*

Endorsed on cover: File No. 20,677. Virginia, City of Radford, corporation court. Term No. 288. The Western Union Telegraph Company, plaintiff in error, *vs.* Sid Wilson. Filed April 25th, 1907. File No. 20,677.

Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff-in-Error,

AGAINST

SID WILSON,
Defendant-in-Error.

BRIEF OF PLAINTIFF IN ERROR UPON MOTION TO DISMISS.

This action is brought to review a judgment of the corporation Court of the City of Radford, Virginia, and as stated in brief in support of the motion, the writ of error runs to the corporation court of Radford, Virginia. The motion is made to dismiss, solely upon the ground that the record does not show affirmatively that the judgment complained of is the judgment of the highest court in the State of Virginia, in which the judgment in that suit could be had. The record discloses that this suit is a suit for a penalty, the sum of $100, under the statute of Virginia.

Upon the trial of the case, the defendant, before the jury was sworn, asked to file its special plea, setting forth that the statute under which the action is brought, was invalid as applied to the case on trial, because the message, whose delay was the subject of

the action was an interstate message, and therefor the statute was an attempt to regulate interstate commerce. This plea the Court refused the defendant leave to file, and the Court granted the defendant in error judgment for the penalty as demanded in the declaration.

The sole ground upon which the motion for dismissal is because the plaintiff in error did not make an application to the Supreme Court of Appeals of Virginia for a writ of error in this particular case, notwithstanding that in another case that court had decided it had no jurisdiction to grant such writ, and it is claimed that this is a fatal omission (Brief, p. 7). The precise question presented by this motion to dismiss, has not been determined by this court.

In the case of the Western Union Telegraph Company against Reynolds, 100 Va., 459, the Supreme Court of the Court of Appeals of Virginia declared the statute of Virginia constitutional, as applied to a message, such as is involved in this case, upon the authority of the case of Lehigh Valley R. R. Co. vs. Penna., 145 U. S., 192.

In the case of The Western Union Telegraph Company against Hughes, 104 Va., 240, the Supreme Court of Virginia, in an action for a penalty upon the same statute and upon a similar message, held that the Telegraph Company was not entitled to a writ of error, for the reason that the case did not involve a question under the Constitution of the United States, and, therefore, the application for writ of error was denied, notwithstanding the decision of this court in Hanley vs. Kansas City So. R. R. Co., 187 U. S., 617. Upon error to this court, this court in Western Union Telegraph Company against Hughes, 203 U. S., 505, held that this court was without jurisdiction, for the reason that the writ of error sued out in that case was directed to the Supreme Court of the Court of Appeals of the State of Virginia, and not to the trial Court. When, therefore, the corporation court at Radford rendered its judgment in this case, the Western Union Telegraph Company, the defendant below, sued out its writ

of error to such corporation court. Under the decisions of the Supreme Court of Appeals of Virginia, which the Corporation Court of Radford was bound to follow, and also the Western Union Telegraph Company, that court of last resort had already decided that such judgment was the judgment of the highest court in Virginia which could render judgment in that case. The sole question here is, whether under section 709 of the Revised Statutes, the Supreme Court of Appeals of Virginia, having decided in the Hughes case that no writ of error lay to that Court, it was necessary in order to lay a foundation for a writ of error to this court that the unnecessary application to the Supreme Court of Appeals of Virginia should be made for such writ of error.

None of the cases quoted by the learned council on the brief go to the extent of holding that any such requirement is necessary, and we submit that the writ of error was properly taken, and that upon the face of this record, in the light of the decisions of the Supreme Court of Appeals of Virginia, construing the statutes of that state, it appears that the Corporation Court of Radford to which the writ of error is directed is the highest court in Virginia which could have passed upon the questions in this case.

Respectfully submitted,

RUSH TAGGART,

Attorney for Plaintiff-in-Error.

Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

against

SID WILSON,
Defendant in Error.

October Term, 1907.
No. 288.

Statement.

This case comes into this Court by writ of error to the Corporation Court of the City of Radford, State of Virginia. The plaintiff in error seeks reversal of the judgment rendered in that Court against it in favor of the plaintiff in error, upon the ground that the judgment violates the Interstate Commerce clause of the Federal Constitution. The judgment is based upon two sections of the Code of Virginia (the section numbers given being those found in Code of 1887).

> "Section 1291: Receipt and Transmission of Dispatches—It shall be the duty of every telegraph company or telephone company doing business in this state to receive dispatches from and for other telegraph or telephone companies or lines and from and for any person; and upon the payment of the usual charges therefor, according to the regulations of the Company, to transmit the same faithfully and impartially and as

promptly as practicable, and in the order of delivery to the said Company. For every failure to transmit a dispatch, faithfully and impartially, and for every failure to transmit a dispatch as promptly as practicable, or in the order of its delivery to the Company, the Company shall forfeit the sum of $100 to the person sending or wishing to send such dispatch. But nothing herein shall prevent any such Company from giving preference to dispatches on official business from or to officers of the United States or the State of Virginia, or from making arrangements with proprietors or publishers of newspapers for the transmission to them for publication of intelligence of general and public interest out of the regular order.

Section 1292: Their Delivery—It shall be the duty of every telegraph or telephone Company upon the arrival of a dispatch at the point to which it is to be transmitted by said Company, to deliver it promptly to the person to whom it is addressed, where the regulations of the Company require such delivery, or to forward it promptly as directed, when the same is to be forwarded. For every failure to deliver or forward a dispatch as promptly as practicable, the Company shall forfeit $100 to the person sending the dispatch or to the person to whom it was addressed."

The Record shows the following facts: The defendant in error was a postal clerk, employed by the United States Government on a train running between Lynchburg and Graham, on the 7th day of August, 1905. A member of his family had died, and he desired to attend the funeral. When the train reached Graham, in the afternoon of that day, he handed a telegram to the operator at that point, reading as follows:

"Postmaster, East Radford, Virginia.

"Phone Corbet to relieve me on arrival of train 2.

Sid Wilson.

Government Rates."

The testimony showed that this message reached the postmaster at East Radford at about 7 o'clock p. m. on the evening of the 7th of August, 1905, and that train No. 2, referred to in the telegram, had arrived at East Radford and departed before the telegram reached him (Record, p. 8). When the case was called for trial and before the jury were sworn, the defendant, by counsel, offered a special plea which the Court refused to allow to be filed, and to which action exception was taken, which presents the federal question relied upon by the plaintiff in error. This was, that the only proper and regular route which the defendant had on the 7th of August, 1905, for transmitting this dispatch from Graham to East Radford, was by first sending it to Bluefield, West Virginia, thence through various offices to Washington, and thence from Washington to East Radford, and that this dispatch was duly transmitted by this route from Graham to the City of Washington, D. C., and that the delay in the transmission of said message occurred in the relay office in the City of Washington, in the District of Columbia, a point outside of the jurisdiction and territory of the State of Virginia, and that by reason of the facts set forth in the plea the transmission of the dispatch from Graham to East Radford was and is Interstate Commerce and that the statute of the State of Virginia prescribing a penalty could not apply to such transmission, because such statute thus applied would be repugnant to Article I, Section 8, of the Constitution of the United States, and as such null and void (Record, pp. 4 and 5).

The Federal question upon which the plaintiff in error relies was thus clearly presented to the Court below, and by the Court denied. The Federal question was also presented by a motion to set

aside the verdict, one of the grounds thereof being the error of the Court in rejecting this special plea (Record, p. 9).

The judgment entered in behalf of the plaintiff below was for the penalty, provided for by the statute; to wit, the sum of $100 and costs. The plaintiff in error sued out writ of error to this Court, assigning as error the refusal of the Court to allow the defendant to file its special plea, that the message was transmitted through the State of West Virginia and the District of Columbia on its way to its destination, and therefore that said message was not an interstate message, and not subject to the provisions of the Virginia laws (Record, p. 11).

ARGUMENT.

I.

The message sued on in this case was an interstate message, and, as such, interstate commerce.

It is settled by numerous decisions of this Court that a telegraph message is commerce, and that, consequently, a message originating in one State and destined to a point in another State is interstate commerce.

W. U. vs. Pendleton, 122 U. S., 347.
W. U. vs. Texas, 105 U. S., 460.
Leloup vs. Mobile, 127 U. S., 640.
W. U. vs. James, 162 U. S., 650.

The question is whether a message is interstate

commerce when it originates in one State and is destined to another point in the same State, but must necessarily be transmitted to and be retransmitted or in telegraphers' parlance "relayed" in another State before it can reach its destination.

The message in the case at bar was to be sent from Graham, Virginia, to East Radford, Virginia. But in order to send it to East Radford, from Graham, it was necessarily sent first to Bluefield, West Virginia, and received at that point. This was the *only possible way* to send it to East Radford, Virginia (Record, p. 13), and, therefore, the *proper way* (*Ibid.*).

Is such a message interstate commerce?

Why it was Necessary that Messages for East Radford Should be Repeated or Relayed at Bluefield.

The record is not burdened by the recital of certain facts within the knowledge of everyone at all familiar with the business of telegraphy, and which indeed may be said to be matters of general knowledge—at any rate facts as to which it is conceived that there can be no dispute in this case.

The record recites that this message was sent to Bluefield, W. Va., and that this was the *only proper and regular route* (Record, p. 13), to transmit it to East Radford. There is no suggestion in the case that the purpose of relaying the message at Bluefield, W. Va., and at Washington was to evade the operation of the laws of Virginia, or any of them.

The telegraph line follows the railroad—a necessary part of the railroad's system, and its inseparable adjunct; following, with the railroad, the line of least resistance, and crossing a State boundary line rather than a range of mountains.

The necessity, therefore, for the relaying of this message at Bluefield and Washington was a physical and actual necessity; not an invention by the plaintiff in error for the purpose of escaping the laws of Virginia.

It is a matter of general knowledge that a company engaged in the conduct of a general telegraph business usually maintains thousands of offices, between any two of which it holds itself out to the public as prepared to offer the means of communication by telegraph. The necessity of "relaying" messages proceeds from the fact that it is physically impossible for all of these many thousand offices to have a wire connecting directly with all the others. To do so would require the maintenance in each office of an impossible number of wires, and an impossible number of sets of instruments and operators, out of all proportion to the requirements of ordinary traffic, and to the great detriment of the telegraph service generally; without mentioning the burdening of the public highways, the postroads of the United States, by these additional wires, to the equally great detriment of the public travel thereon. Hence the invention of the relaying process. The essential feature of this is the establishment of a system of large offices from each of which wires radiate to the small offices in a given territory, and which are connected with one another by trunk lines. The small offices send their messages to the nearest large relay point, over a wire which ends at the relay office; at the relay office the messages are written down by the operator who receives them, and are then transferred to the operator who sends them, over another and different wire, to the place of destination, or the next relay point, and this is the only way in which telegraphing for any considerable distance

has ever been conducted, or can be conducted, and it is the explanation why the message in the case at bar was not sent direct, by one single act of transmission, from Graham to East Radford, but was necessarily and properly sent first to Bluefield and then to Washington in the endeavor to transmit it to its destination.

On Principle, the Message Sued On was Interstate Commerce.

If the question were absolutely *res nova*, it would seem that the answer to it should not be difficult.

The object of the Constitutional provision conferring on Congress power to regulate interstate commerce was to protect such commerce. It was to prevent a single State from prohibiting such commerce or burdening it with restrictions which would render it impossible practically and thereby work injury to the people of other States. It was to prevent different States, each, perhaps, acting in good faith and with the best intentions, from imposing on the same act of interstate transportation or transmission different and perhaps conflicting rules and regulations with all of which it might be impossible to comply. It was to prevent one State from insisting, with force if necessary, on the application of its own domestic policy to commerce passing through other States.

We venture, therefore, to assert, as a broad principle, that:

Whenever transportation or transmission is of such a character that unless it is to be regarded as interstate commerce it would be within the power of one State, acting with due process of law, to impede or prevent the thing transported or transmitted from reaching the territory of another State,

for which it is destined, then that transportation or that transmission is within the protection of the Constitutional provision, and not subject to regulation by either State.

If this is a correct statement of the law, the message in the case at bar is an interstate message.

It originated at Graham, Va., and was destined to East Radford, Va. But in order to send a message from Graham to East Radford, it was necessary, as was set forth in the defendant's special plea, and the reasons for which have been fully set out heretofore, first that it should be sent over one wire to Bluefield, West Virginia, and received there, and secondly, that some one at Bluefield, West Virginia, should send it (over another wire, or the "relaying" process would not be necessary or proper) to Washington, D. C., and thence to East Radford, Va.

The telegraph line used in this process was an interstate line. A part of it, a part necessarily used in the transmission of this message, was within the territorial jurisdiction of the State of West Virginia and subject to the State of West Virginia's physical control. The Bluefield relay office was in West Virginia, and under its control and jurisdiction. Consequently the State of West Virginia, unless prevented from so doing by the fact that the message was interstate commerce, could have (1) forbidden and forcibly prevented the transmission of the message over its territory, if, for any reason, such transmision had been deemed contrary to the domestic policy of that State; or (2) prescribed the order in which, with reference to other messages, it should be transmitted from Bluefield after its receipt there; prescribing, perhaps, a different order of transmission from that prescribed by the statute of Virginia under which the suit is brought; preferring, perhaps, some other mes-

sage which under the Virginia statute the telegraph company was not authorized to prefer; or (3) regulated the rate which should be charged for that portion (at least) of the transmission service which took place within the State of West Virginia.

The plaintiff in error respectfully insists that the State of West Virginia could have done none of these things; and if it could not, the limitation on its power can arise only from the fact that the message was interstate commerce.

Confusion Arising from Lehigh Valley Railroad vs. Pennsylvania.

Had it not been for the decision in Lehigh Valley vs. Pennsylvania, 145 U. S., 192 (1891), it is believed that it would not have been seriously conceived by any State Court that, under the Constitution of the United States, commerce passing out of the physical and territorial jurisdiction and control of the State of its origin and into that of a foreign State, should properly be regarded as other than interstate commerce, because of the further circumstance that such commerce eventually returned to a point of destination within the State of its origin. The idea that such commerce is domestic, and not interstate, is, it is respectfully submitted, a fiction. And it is a fiction wholy attributable to the Lehigh Valey case (*supra*).

In that case the question arose as to the validity of a tax imposed by the State of Pennsylvania on the Lehigh Valley Railroad Company, a corporation of Pennsylvania, on account of transportation done by it from Mauch Chunk, in that State, to Philadelphia, in the same State, by way, however, of Phillipsburg, in the State of New Jersey.

The Chief Justice, in delivering the opinion of the Court, said:

> "*The tax under consideration here was determined in respect of receipts for the proportion of the transportation within the State,* but the contention is that this could not be done because the transportation was an entire thing, and in its course passed through another State than that of the origin and destination of the particular freight and passengers. THERE WAS NO BREAKING OF BULK OR TRANSFER OF PASSENGERS IN NEW JERSEY. The point of departure and the point of arrival were alike in Pennsylvania. The intercourse was between those points and not between any other points. In such intercourse, consisting of continuous transportation between two points in the same State, made interstate because in its accomplishment some portion of another State may be traversed? Is the transmission of freight or messages between two places in the same State made interstate business *by the deviation of the railroad or telegraph line on to the soil of another State?*"
>
> * * * * * *
>
> "It should be remembered that *the question does not arise* as to the power of any other State than the State of the termini, nor as to taxation upon the property of the company situated elsewhere than in Pennsylvania, *nor as to the regulation by Pennsylvania of the operations of this or any other company elsewhere,* but it is simply whether, in the carriage of freight and passengers between two points in one State the mere passage over the soil of another State renders that business foreign, which is domestic. We do not think such a view can be reasonably entertained, and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk."

Even Under Lehigh Valley vs. Pennsylvania, the Message in this Case Should Be Treated as Interstate.

The language used by the Chief Justice in the Lehigh Valley case, has, as we shall hereafter show, been seriously misunderstood and misapplied.

But even under that decision, and giving full weight to the dicta contained in the opinion and not strictly necessary to the determination of the controversy before the Court, it is clear that the statute of Virginia now in question would not have been sustained, in its application to this message, on the principle then recognized by the Court.

Whether the Chief Justice was or was not wholly correct in his suggestion that the transmission of freight or messages between two places in the same State was not "made interstate business by the deviation of the railroad or telegraph line on to the soil of another State" (*i. e.*, by such deviation *alone*) he clearly recognized that a different situation would have existed and that a different conclusion would have been called for had there been *anything more than a mere deviation* of the railroad or telegraph line.

He said:

> *"There was no breaking of bulk or transfer of passengers in New Jersey."*

In the case at bar there was clearly, it is submitted, that which in the transmission of a telegraph message is equivalent to a breaking of bulk or a transfer of passengers in the transportation of freight or persons.

In the case at bar it was necessary that the message in question should be "relayed" at Bluefield,

in the State of West Virginia and at Washington (Record, p. 13). To relay a message, as has been seen, involves two separate acts. It involves the receipt of the message over one telegraph wire by an operator, who writes it down as he receives it, and its transmission over another and different telegraph wire, to its designation, or the next relay point, by a telegraph operator—the one who received it, or some other. In any event it involves two separate acts: It involves the act of receipt, and the act of further transmission. That both of these acts were involved in the case of the message sued on, and that both acts were to be done at Bluefield, outside the State of Virginia, appears clearly from the special plea (Record, p. 4). The message was sent to Bluefield and thence to Washington (Special Plea, p. 5); the message was received at Bluefield and Washington (*Ibid.*); and the message was delayed at Washington.

Had this situation been presented to the Court that decided the Lehigh Valley case, it is submitted that the transaction would clearly have been held to be interstate commerce. There was a transshipment. There was a breaking of bulk.

There is a second reason why, even under the doctrine of the Lehigh Valley case, it is impossible to sustain this statute of Virginia, in its application to the message in the case at bar.

The decision in the Lehigh Valley case was, first and last, *a tax decision*. It did not involve, and should never have been understood to involve any question of the regulation of commerce. It involved nothing more than the taxation of property, and nothing *but the taxation of property within the State.*

Said the Chief Justice:

"The tax under consideration here was de-

termined in respect of receipts *for the proportion of the transportation within the State.*"

Said the Chief Justice again:

"It should be remembered that the question does not arise * * * as to taxation upon the property of the company situated elsewhere than in Pennsylvania,"—

(This is singularly clear.)

—"*nor as to the regulation by Pennsylvania of the operations of this or any other company elsewhere,*" etc.

It is not to be supposed for a moment that the transportation involved in the Lehigh Valley case would, by any fiction, have been regarded as domestic to Pennsylvania, had the question been presented in a form involving, not the power of the State of Pennsylvania *to tax property* within its own limits, but the power of the State of Pennsylvania *to regulate the acts of a carrier in the State of New Jersey*, or to provide what the carrier should do in that State, or how the carrier should do it.

State Decisions Following and Improperly Extending Lehigh Valley R. R. vs. Pennsylvania.

The three most conspicuous examples of the lengths to which the fiction adopted in the Lehigh Valley case has been carried are:

Campbell vs. Chicago, etc., Railway, 86 Iowa, 587.

Seawell vs. Kansas City, etc., Railway, 119 Mo., 222.

State *ex rel.* R. R. Commissioners vs. W. U. Tel. Co., 113 N. C., 213.

As all these cases may be considered overruled, in so far as they relate to this particular point, by Hanley vs. Kansas City Southern Ry. Co., 187 U. S., 617, and as the three cases first named would be decisive of the case at bar in a manner contrary to the contention of the plaintiff in error, they may be briefly examined.

Campbell vs. Chicago, etc., Railway involved the validity of an order of the Railroad Commission of Iowa fixing a rate for the transportation of goods from Beloit, in the State of Iowa, to Sioux City, in the same State, a part of the transportation, a little less than one-half, in all, of the total distance, being through the State of South Dakota. The railway line crossed the South Dakota boundary four times. It was held, on the authority of the Lehigh Valley case, that this transportation was not interstate commerce, and that the provision of the Iowa statute, under which the schedule of rates sought to be enforced was adopted (Section 1 of Chapter 28 of the Acts of the Twenty-second General Assembly), to the effect that the regulations of that chapter, fixing the maximum rates of freight, should be applicable whether the transportation "shall be wholly within this State or partly within this State and an adjoining State or States" was *not* unconstitutional.

Seawell vs. Kansas City, etc., Railway involved the right of a shipper to recover a penalty provided for under the Revised Statutes of Missouri, for receiving a greater compensation for a short haul than for a long haul. The transportation in question was from Carbon Center, in the State of Missouri, to Kansas City, in the State of Missouri, but four-fifths of it was in the State of Kansas. On the authority of the Lehigh Valley case the Supreme Court of Missouri held that this transportation

was not interstate commerce, and that the penalty was recoverable.

State *ex rel.* R. R. Commissioners vs. W. U. Tel. Company is of the greatest interest in connection with the case at bar. It involved the power of the Railroad Commission of North Carolina to fix rates for the transmission of telegraph messages from points along the Norfolk and Southern Railroad, in the State of North Carolina, to other points in the same State, it appearing, however, that in the transmission of all such messages the "shortest and only route" used by the defendant traversed about two hundred and sixty-nine miles in Virginia, and required messages to be sent by way of Norfolk. *On the authority of the Lehigh Valley case the Supreme Court of North Carolina held that such messages were not interstate commerce, and were subject to regulation by the Railroad Commissioners of the State.*

The Court said:

> "A more serious question, however, is presented by the ruling of the Court upon the third conclusion of the Commission, which is as follows: 'That telegraphic messages transmitted by defendant over its said line from Elizabeth City or Edenton, or other points in North Carolina, to points in said State, do not constitute commerce between States, although traversing another State in the route, and are subject to the rate prescribed by the Commission.' It appears from the findings of fact that the shortest and only route over the wire of the defendant, by which messages can be transmitted to many points in this State, necessarily 'traverses,' in part, the State of Virginia and thence back into North Carolina; and it is insisted that such messages so transmitted are interstate commerce, and therefore not subject to the tariff regulation of the Commission.

"It is not denied that the offices of the defendant along the line of the Norfolk and Southern Railroad Company, except those at Edenton and Elizabeth City, receive commercial messages for transmission, in the manner described, to various points in North Carolina; and it is plain that such business does not relate to the intercourse of the citizens of this State with those of some other State. * * * *It must be manifest, therefore, that this business is without a single feature of interstate commerce, unless it can be found in the fact that, in the transmission of a message, it must traverse a part of the defendant's own line in the State of Virginia.* We have been referred to several cases in which it has been held, in respect to the continuous carriage of freight by a railroad company under such circumstances, that a State Commission had no power to prescribe rates, and also that a State had no right to levy a tax upon the gross receipts, even as to that part derived from the transportation within its territory (State vs. Chicago Railroad Co., 40 Minn., 267; Sternberger vs. Railroad, 29 S. C., 510; North Carolina Cotton Exchange vs. Cincinnati, N. O. & T. P. Railroad, 2 Interstate Commerce Reports, 386).

"Without attempting to discuss these cases, and to distinguish them in some particulars from ours, it is sufficient to say that, if they are not distinctly overruled, their principle is certainly in conflict with the reasoning of the opinion of the Supreme Court of the United States (Fuller, C. J.) in Lehigh Valley Railroad Co. vs. Pennsylvania, 145 U. S., 192."

Hanley vs. Kansas City Southern Railway.

In Hanley vs. Kansas City Southern Railway Company, 187 U. S., 617 (1902), the Lehigh Valley case was explained, the doctrine of that case confined within its proper limits, the foregoing deci-

sions of the State Courts extending the doctrine of the Lehigh Valley case expressly disapproved, and the true rule of law applicable to transportation or transmission of the character involved in the case at bar recognized and applied. It is the belief of counsel for plaintiff in error, that the Hanley case is conclusive of the present litigation and that no distinction between them is possible.

The Hanley case involved the right of the Railroad Commission of the State of Arkansas to fix and enforce rates covering the transportation of goods on a through bill of lading from Fort Smith, Ark., to Grannis, *Ark.* (not Grannis, *Kansas,* as would appear from a misprint in the official syllabus in 187 U. S.), over the lines of the Kansas City Southern Railway, the complainant below in that case, by way of Spiro in the Indian Territory, a total distance of one hundred and sixteen miles, of which fifty-two were in Arkansas and sixty-four in the Indian Territory; there having been no transshipment in the Territory, and no breaking of bulk. The case came to this Court on appeal from a decree of the Circuit Court of the Eastern District of Arkansas, overruling a demurrer to a complaint by the railway company against the Railroad Commissioners of the State, seeking to enjoin them from fixing and enforcing rates covering the transportation referred to. It was held that the transportation in question was interstate commerce, and that it was under the regulation of Congress and free from interference by the State; and that the bill for injunction stated a cause of action for equitable relief, and that the decree of the Circuit Court should be affirmed.

Mr. Justice HOLMES, writing the opinion of this Court, after premising that the power of Congress over commerce between Arkansas and the Indian

Territory is not less than its power over commerce among the States, summed up the situation in a few incisive words:

> "*The transportation of these goods certainly went outside of Arkansas,* and we are of opinion that in its aspect of commerce it was not confined within the State. *Suppose that the Indian Territory were a State and should try to regulate such traffic, what would stop it? Certainly not the fiction that the commerce was confined to Arkansas.* If it could not interfere the only reason would be that this was commerce among the States. But if this commerce would have that character as against the State supposed to have been formed out of the Indian T[illegible]ritory, it would have it equally as against the State of Arkansas. If one could not regulate it the other could not."

Continuing he says:

> "No one contends that the regulation could be split up according to the jurisdiction of State or Territory over the track, or that both State and Territory may regulate the whole rate. There can be but one rate, fixed by one authority, whether that authority be Arkansas or Congress. Wabash, St. Louis & Pacific Railway Co. vs. Illinois, 118 U. S., 557; Covington & Cincinnati Bridge Co. vs. Kentucky, 154 U. S., 204; Hall vs. De Cuir, 95 U. S., 485. But it would be more logical to allow a division according to the jurisdiction over the track than to declare that the subject for regulation is indivisible, yet that the indivisibility does not depend upon the commerce being under the authority of Congress, but upon a fiction which attributes it wholly to Arkansas, although that fiction is quite beyond the power of Arkansas to enforce.
>
> "It is decided that navigation on the high seas between ports of the same State is subject to regulation by Congress, Lord vs. Steamship Co., 102 U. S., 541, and is not subject to reg-

ulation by the State, Pacific Coast Steamship Co. vs. Railroad Commisisoners, 9 Sawyer, 253, and although it is argued that these decisions are not conclusive, the reason given by Mr. Justice Field for his decision in the last cited case disposes equally of the case at bar. 'To bring the transportation within the control of the State, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the State.' 9 Sawyer, 258. Decisions in point are State vs. Chicago, St. Paul, Minneapolis & Omaha Railway Co., 40 Minnesota, 267; Sternberger vs. Cape Fear & Yadkin Valley Railroad Co., 29 So. Car., 510. See also Milk Producers' Protective Association vs. Delaware, Lackawanna & Western Railroad Co., 7 Interstate Commerce Rep., 92, 160, 161.

"There are some later State decisions contrary to those last cited. Campbell vs. Chicago, Milwaukee & St. Paul Railway Co., 86 Iowa, 587; Seawall vs. Kansas City, Ft. Scott & Memphis Railroad Co., 119 Missouri, 222; Railroad Commissioners vs. Western Union Telegraph Co., 113 No. Car., 213. But these decisions were made simply out of deference to conclusions drawn from Lehigh Valley Railroad Co. vs. Pennsylvania, 145 U. S., 192, and we are of opinion that they carry their conclusions too far. That was the case of a tax and was distinguished expressly from an attempt by a State directly to regulate the transportation while outside its borders. 145 U. S., 204."

No Distinction Between the Transportation in the Hanley Case and the Transmission in the Case at Bar.

It is impossible to conceive of any valid distinction between the Hanley case and the present one. In both cases the subject under consideration was commerce.

In both cases the question was whether or not it was subject to regulation by a State.

In both cases the commerce had its origin and destination in the same State.

In both cases the subject of commerce necessarily passed, in transit, out of the physical and territorial jurisdiction and control of the State of its origin and destination, and into that of a foreign State.

In both cases it was the State of origin and destination which sought to regulate the commerce.

The only conceivable distinctions between the cases (apart from that already adverted to) are (1) that the Hanley case involved Arkansas and the Indian Territory, while the case at bar involves Virginia, West Virginia and the District of Columbia; and (2) that the Hanley case involved the carriage of goods, while the case at bar involves the transmission of a message.

But in deciding the Hanley case it was clearly present to the minds of the Court that the result there reached, whatever it might be, must be applicable to the transmission of messages as well as to the transportation of freight. **This is certain from the fact that the Court expressly disapproves the decision of the Supreme Court of North Carolina in Railroad Commissioners vs. W. U. Tel. Co. (supra), holding that the transmission of messages in such a case as the case at bar was within the doctrine of Lehigh Valley vs. Pennsylvania, and, as such, not interstate commerce.**

II.

A State Statute regulating the transmission of telegrams is invalid, in its applicaton to interstate messages, unless it is to be supported under the exceptional doctrine of W. U. Tel. Co. vs. James; and the statute in question, in its application to the transmission of this message, cannot be so supported, because there was no default within the State of Virginia.

It will not be disputed that, *prima facie*, a State statute requiring, under a penalty, that telegrams shall be transmitted and delivered, and prescribing the order in which the transmission and delivery shall take place, is an attempt to regulate commerce. In so far as such a statute assumes to apply to an interstate message, it assumes to regulate interstate commerce; and it requires no elaborate reference to authorities to establish that such an attempt at regulation of interstate commerce, by a State, is *prima facie* invalid.

Hall vs. De Cuir, 95 U. S., 485.
W. U. Tel. Co. vs. Pe[illegible]ton, 122 U. S., 347.

In Hall vs. De Cuir a statute of Louisiana forbade all carrier of passengers to refuse admission to their vehicles to any person of good character, etc., especially forbidding any discrimination on account of color or race. Under that statute the plaintiff, a colored woman, journeying from New Orleans to Hermitage, both in the State of

Louisiana, insisted on admission to a steamboat cabin reserved for white persons. The question was whether the statute of Louisiana could constitutionally apply to the transportation of the plaintiff between the points named, both in Louisiana; the fact being that the vessel on which she was a passenger was engaged in the transportation of passengers and freight along the Mississippi River between New Orleans, in the State of Louisiana, and Vicksburg, in the State of Mississippi, touching at the intermediate landings both within and without Louisiana, as occasion required. This Court held, reversing the Supreme Court of Louisiana, that the Louisiana act, in so far as it had been held by the Supreme Court of that State to apply to vessels engaged in interstate commerce, *even while those vessels were proceeding between two given points in the same State*, was unconstitutional, as an attempted interfence, by the State, with the power of regulation which, as to such traffic, was vested exclusively in Congress:

> "This power of regulation may be exercised without legislation as well as with it. By refraining from action, Congress, in effect, adopts as its own regulations those which the common law, or the civil law where that prevails, has provided for the government of such business, and those which the States, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution. In fact, congressional legislation is only necessary to cure defects in existing laws, as they are discovered, and to adapt such laws to new developments of trade. As was said by Mr. Justice FIELD, speaking for the Court in Welton vs. The State of Missouri, 91 U. S., 282, 'inaction [by Congress] * * * is equivalent to a declaration that interstate commerce shall remain free and untrammelled.' "

The following language of the Court, which has been widely quoted, is also significant:

> "If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate."

W. U. Tel. Co. vs. Pendleton.

In the Pendleton case (122 U. S., 347) it appeared that a statute of Indiana (Revised Statutes of Ind., 1881, Sections 4176, 4178) required telegraph companies to deliver dispatches by messenger to the persons to whom the same were addressed, or to their agents, provided they resided within one mile of the telegraphic station, or within the city or town in which such station was, under a penalty of one hundred dollars. The plaintiff below in that case sued to recover the above penalty for the failure of the telegraph company, the defendant below, to deliver at Ottumwa, in Iowa, a message received by it in Indiana for transmission to that place. The Supreme Court of Indiana construed the statute above referred to as applying

to the delivery of the message then in question at Ottumwa, and affirmed a judgment in favor of the plaintiff for the amount of the penalty. On writ of error to this Court, the judgment was reversed. It was held that the statutes in question were in conflict with the commerce clause of the United States Constitution "in so far as they attempt to regulate the delivery of such dispatches at places situated in other States;" that **"the authority of Congress over the subject of commerce by telegraph with foreign countries or among the States being supreme, no State can impose an impediment to its freedom, by attempting to regulate the delivery in other States of messages received within its own borders;"** and that the police power of the State did not extend "to the regulation of the delivery at points without the State" of messages received within, but only to the making of "all necessary provisions in respect of the buildings, poles and wires of telegraph companies **within its jurisdiction,** which the comfort and convenience of the community may require."

Mr. Justice FIELD wrote the opinion of the Court:

> "The object of vesting the power to regulate commerce in Congress was to secure, with reference to its subjects, uniform regulations, where such uniformity is practicable, against conflicting State legislation. Such conflicting legislation would inevitably follow with reference to telegraphic communications between citizens of different States, if each State was vested with power to control them beyond its own limits. The manner and order of the delivery of telegrams, as well as of their transmission, would vary according to the judgment of each State. Indiana, as seen by its

law given above, has provided that communications for or from officers of justice shall take precedence, and that arrangements may be made with publishers of newspapers for the transmission of intelligence of general and public interest out of its order; but that all other messages shall be transmitted in the order in which they are received; and punishes as an offense a disregard of this rule. Her attempt, by penal statutes, to enforce delivery of such messages in other States, in conformity with this rule, could hardly fail to lead to collision with their statutes. Other States might well direct that telegrams on many other subjects should have precedence in delivery within their limits over some of these, such as telegrams for the attendance of physicians and surgeons in case of sudden sickness or accident, telegrams calling for aid in cases of fire or other calamity, and telegrams respecting the sickness or death of relatives.

"Indiana also requires telegrams to be delivered by messengers to the persons to whom they are addressed, if they reside within one mile of the telegraph station, or within the city and town in which such station is; and the requirement applies, according to the decision of its Supreme Court in this case, when the delivery is to be made in another State. Other States might conclude that the delivery by messenger to a person living in a town or city being many miles in extent was an unwise burden, and require the duty within less limits; but if the law of one State can prescribe the order and manner of delivery in another State, the receiver of the message would often find himself incurring a penalty because of conflicting laws, both of which he could not obey. Conflict and confusion would only follow the attempted exercise of such a power. We are clear that it does not exist in any State."

It is to be observed that the Virginia statute under consideration in the case at bar is extremely

similar to the Indiana statute considered in W. U. Tel. Co. vs. Pendleton. Like the Indiana statute it contains a provision that:

> "Nothing herein shall prevent any such company from giving preference to dispatches on official business, from or to officers of the United States, or the State of Virginia, or from making arrangements with proprietors or publishers of newspapers, for the transmission to them, for publication, of intelligence of general and public interest, out of its regular order."

Every word said by Mr. Justice Field applies as well to the Virginia statute as to that of Indiana. There is nothing in the law of West Virginia which authorizes a telegraph company to prefer a dispatch, sent on the official business of the State of Virginia, to a prior dispatch received in any telegraph office in West Virginia; nor is there anything in the law of West Virginia which authorizes the preference of messages addressed to newspapers. What was the duty of this plaintiff in error, on the receipt of the message in suit at Bluefield in the State of West Virginia, or at Washington, D. C., with reference to its further transmission? If the Virginia statute applied to the conduct of the agents of the telegraph company at the Bluefield and Washington offices, what was the duty of those agents in respect of this message? Could it have been postponed for the sake of giving a preference to a later message affecting the official business of the State of Virginia? Was it not within the police power of the State of West Virginia to prescribe the order in which messages received at Bluefield should be sent from Bluefield to Washington, if it was within the power of the State of Virginia to prescribe the order in which messages should be sent from Graham to Bluefield? Which law was it the duty of the Bluefield operators to obey?

W. U. Tel. Co. vs. James.

W. U. Tel. Co. vs. James, 162 U. S., 650, was the converse of the Pendleton case.

In the Pendleton case the message originated in Indiana, and was sent to Iowa, and it was for a default in the State of Iowa that the plaintiff sought to recover the Indiana penalty in an Indiana Court. In the James case, on the contrary, the message originated in Alabama, and was destined to a place in Georgia; it was properly transmitted to the point of destination, within the State of Georgia, and there was a negligent failure to deliver there; and the plaintiff sued in a Georgia Court for the penalty provided for by the laws of Georgia, for the default in that State.

This Court sustained the Georgia statute, in its application to the message then sued on, on the ground that the default which was then the subject of complaint was a default which occurred within the jurisdiction of the State of Georgia, and not in any foreign State. It said:

> "We see no reason to fear any weakening of the protection of the constitutional provision as to commerce among the several States by holding that in regard to such a message as the one in question, although it comes from a place without the State, *it is yet under the jurisdiction of the State where it is to be delivered (after its arrival therein at the place of delivery)*, at least so far as legislation of the State tends to enforce the performance of duty owed by the company under the general law."

And again:

> "Nor is the statute open to the same objections that were regarded as fatal in the Pendleton case, 122 U. S., 347. **No attempt is here made to enforce the provisions of the State statute beyond**

the limits of the State, and no other State could by legislative enactment affect in any degree the duty of the company in relation to the delivery of messages within the limits of the State of Georgia. No confusion therefore could be expected in carrying out within the limits of that State the provisions of the statute."

It is to be observed that Mr. Justice White and Mr. Justice Shiras dissented from the opinion of the majority in the James case, seeing no sound distinction between that case and the Pendleton case.

In the Case at Bar there was no Default in Virginia.

But whether or not the difference between the facts of the James case and the facts of the Pendleton case justified the difference in the result reached—whether or not the distinction made between those cases by the majority of the Court in the James case was sound on principle, it is perfectly clear, at least, what that distinction was. Reading W. U. Tel. Co. vs. Pendleton and W. U. Tel. Co. vs. James together, and giving each case its full value, we arrive at the following rule of law and exception:

> RULE. A State statute regulating the transmission of telegrams is invalid in so far as it applies, or assumes to apply, to the transmission or delivery of messages to or from other States;
>
> EXCEPTION. But such a statute may be valid as applied to a default in the delivery of a message after its arrival at its place of delivery within the State where the statute exists, even though such message originated in a foreign State.

The Supreme Court of Appeals of Virginia has sought to sustain the principle upon which the Court below proceeded in excluding the Special Plea under the doctrine of W. U. Tel. Co. vs. James; and it is believed that there is no contention on the part of defendant in error that it is to be supported on any other principle.

W. U. Tel. Co. vs. Reynolds, 100 Va., 459.
W. U. Tel. Co. vs. Hughes.

But the essential feature, which was present in the James case, and which in the minds of the majority of this Court distinguished it from that of Pendleton, was that the default relied on by the plaintiff occurred *within the limits of the State of Georgia:*

> "Under the jurisdiction of the State where it" (the message) "is to be delivered (after its arrival therein at the place of delivery)—"
>
> Opinion of the Court, page 661.

And again:

> "No attempt is here made to enforce the provisions of the State statute beyond the limits of the State."
>
> *Ibid.*, page 662.

If the message in the James case, which originated in Alabama, had never been sent out of Alabama or into the jurisdiction of the State of Georgia, can it be doubted for a moment that this Court would have refused to allow the Georgia statute to apply? To apply the statute, in that case, would have been to permit the State of Georgia to regulate the acts of a telegraph company's agents in the State of Alabama, which is absurd.

In the case at bar there was no default within the State of Virginia. This appears clearly from the Special Plea (Record, p. 5). The message was sent as promptly as practicable, faithfully, impartially, and in the order of its receipt by the company, from Graham, Va., to Bluefield, West Va., and thence to Washington, D. C. It was at Washington, D. C., delayed. **The fault, if any, was at Washington, and was not within the State of Virginia.**

There is nothing in the record from which the Corporation Court or this Court could infer that at any time or at any place within the geographical boundaries of Virginia and the territorial jurisdiction of that State, this plaintiff in error or any of its agents or servants was guilty of a violation of the statute now under consideration with respect to this message or failed in any duty imposed thereby. The plaintiff in error, the defendant below, did fail in the duty which the statute sought to impose; but the failure was a failure on the part of the defendant to promptly forward the message from Washington, and that was not within the jurisdiction of the State of Virginia, and the James case does not authorize the plaintiff to recover a penalty for the violation, at Washington, of a Virginia penal law.

In favor of this plaintiff, an informer, who has sustained no actual damage and whose recovery is, substantially, a fine, this Court should not, it is respectfully submitted, be alert to sustain, by the fiction adopted for another purpose in the Lehigh Valley case, this judgment of the Corporation Court of the City of Radford.

III.

The judgment of the Corporation Court of the City of Radford, Virginia, should be reversed.

Respectfully,

JOHN F. DILLON,
GEORGE H. FEARONS,
RUSH TAGGART,
FRANCIS RAYMOND STARK,
Attorneys for Plaintiff in Error.

IN THE UNITED STATES SUPREME COURT.

THE WESTERN UNION TELEGRAPH CO.,

PLAINTIFF IN ERROR,

vs.

SID WILSON.

BRIEF OF COUNSEL

FOR DEFENDANT IN ERROR.

Upon a writ of error to the judgment of the Corporation Court of the City of Radford, Va.

STATEMENT OF CASE.

The defendant in error, Sid Wilson, at the second April rules, 1906, brought an action of debt against the Western Union Telegraph Company for the sum of One Hundred Dollars for failure to promptly transmit a telegraph message forwarded by the said Sid Wilson from the office of the said Western Union Telegraph Company at Graham, in the County of Tazewell, Virginia, to the Postmaster at East Radford, in the same State. The action was brought under Section 1294H of the Code of Virginia, and the defendant in error filed his declaration, which was in the words and figures as follows:

Declaration.

VIRGINIA:

Corporation Court, City of Radford, To-wit:

To 2nd April Rules Thereof, 1906.

Sid Wilson complains of the Western Union Telegraph Company, a corporation, of a plea that he rendered unto it the sum of one hundred ($100.00) dollars which to him it owes and from him unjustly detains, for this, to-wit: that heretofore, to-wit: on the 7th day of August, 1905, the said defendant was a Telegraph Company, doing business in the State of Virginia, and was the owner and operator of a certain Telegraph line running from its office at Graham, Tazewell County, Virginia, to East Radford, Virginia, and the said plaintiff on the day and year aforesaid, delivered to the said defendant at its telegraph office at Graham, Virginia, aforesaid, and the said defendant then and there received from the said plaintiff a telegraphic dispatch in substance in the words and figures following, to-wit:

2 GRAHAM, VA., 8/7/5.
"Post Master, East Radford, Va.:
Phone Corbett to relieve me on arrival of train 2.
(Signed) SID WILSON."

And the said plaintiff then and there paid to the said defendant, and the said defendant then and there received from the said plaintiff the usual charges for such messages, according to the regulations of the said Company for the transmission and delivery of the dispatch aforesaid; and it was the duty of the said Company to transmit the said dispatch from its office at Graham, Virginia, to its office at East Radford, Virginia, faithfully and impartially, and as promptly as practicable and in the order of its delivery to the said Company by said plaintiff; but the said defendant not regarding its duty in this behalf, negligently, improperly and unlawfully and contrary to the form of the statute in such

cases made and provided then and there failed to transmit said dispatch from its office at Graham, Virginia, to its office at East Radford, Virginia, faithfully and impartially and as promptly as practicable and in the order of its delivery to said Company; such failure to transmit said dispatch extended over a long space of time, to-wit: the space of about five hours, so long in fact that it could not possibly have been of any use to the said plaintiff, and this fact was well known to the said defendant, whereby and by reason of the statute in such cases made and provided, an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of $100.00 above demanded:

And for this also, to-wit:

That heretofore, to-wit: On the 7th day of August, 1905, the said defendant was a Telegraph Company doing business in the State of Virginia, and was the owner and operator of a certain telegraph line running from its office in Graham, Tazewell County, Virginia, to East Radford, Virginia, and has telegraphic offices for the reception, transmission and delivery of dispatches at said office at Graham, Virginia, and East Radford, Virginia, and the said plaintiff on the day and year aforesaid delivered to the said defendant at its telegraph office at Graham, Virginia, and the said defendant then and there received from the said plaintiff, a telegraphic message in substance in the words and figures following, to-wit:

3

GRAHAM, VA., 8/7/5.

"Post Master, East Radford, Va.:
Phone Corbett to relieve me on arrival of train 2.
(Signed) SID WILSON."

And the said plaintiff then and there paid to the said defendant, and the said defendant then and there received from him the usual charges for such messages according to the regulations of the said Company for the transmission and delivery of the dispatch aforesaid, and the said defendant transmitted the same to its office at East Radford, Virginia, at which office the said dispatch arrived, and the regulations of the said defendant at its office at East Radford, Virginia, required the delivery of the said dispatch promptly

to the person to whom it was addressed, to-wit: to the said Post Master at East Radford, Virginia, whereby and by virtue of the statute in such cases made and provided it became and was the duty of the said defendant upon the arrival of the said dispatch at its office at East Radford, Virginia, to deliver the same as promptly as practicable to the said Post Master at East Radford, Virginia, to whom it was addressed; but the said defendant, not regarding its duty in this behalf, negligently, improperly and unlawfully, and contrary to the form of the statute in such cases made and provided, then and there did not deliver the said dispatch upon its arrival at its office at East Radford, Virginia, as promptly as practicable to the said Post Master at East Radford, Virginia, but negligently and unnecessarily delayed the delivery of the same; whereby and by reason of
4 the statute in such cases made and provided an action hath accrued to the plaintiff to demand, and have of and from the defendant the said sum of $100.00 above demanded.

Yet the said defendant, although often requested, hath not paid to the said plaintiff the said sum of $100.00 above demanded, or any part thereof, but the same to pay hath hitherto neglected and refused and still doth neglect and refuse, to the damage of the plaintiff $100.00, and therefore he brings his suit.

H. C. TYLER, *p. q.*

The record shows that on the 11th day of June, 1906, prior to the trial of the case, the Western Union Telegraph Company demurred to the declaration and plead the general issue in the case, and by the consent of parties the cause was continued.

On the trial of the cause in the Corporation Court of Radford, Virginia, which was held on the 27th day of February, 1907, a jury returned a verdict in favor of Sid Wilson in the sum of One Hundred Dollars. Whereupon, the Western Union Telegraph Company, defendant in the lower court, moved the said court to set aside the verdict

as being contrary to law and evidence, which motion being overruled, the court directed that judgment be entered for the plaintiff in accordance with the verdict of the jury.

Thereupon the said Western Union Telegraph Company prayed of this honorable court a writ of error and *supersedeas*, and assigned as error, first, that the said lower court erred in refusing to allow the defendant, the Western Union Telegraph Company, to file its special plea that the message was transmitted through the District of Columbia on its way to its destination, and therefore that said message was an interstate message and not subject to the provisions of the Virginia statute. Second, that said court erred in rendering judgment in favor of the plaintiff when the said judgment should have been rendered for the defendant.

On the 10th day of April, 1907, the writ of error prayed of this honorable court was granted.

And thereupon the defendant in error, Sid Wilson, by his Counsel, moved that the writ of error aforementioned, be dismissed as improvidently awarded.

ARGUMENT.

The motion of the defendant in error that the writ of error in this cause be dismissed as improvidently awarded is based upon the ground that the record in this cause does not show affirmatively that the judgment complained of is a judgment of the highest court in the State of Virginia in which a judgment in this suit could be had. (See Section 709, Revised Statutes, U. S.)

It is contended by defendant in error that the record must show affirmatively that the jurisdiction of the highest State court in which a judgment in this cause could be secured must be invoked and refused. (Fisher *vs.* Perkins, 122 U. S., page 522; Gregory *vs.* McVey, 23 Wallace, page 194.)

The Constitution of Virginia in Sec. 88 provides, among other things, that the Supreme Court of Appeals of the State shall have jurisdiction subject to such reasonable rules as may be prescribed by law as to the course of appeal, the limitation as to time, the security required, if any, the granting or refusing of appeals, and the procedure therein, in all cases involving the constitutionality of a law as being repugnant to the Constitution of this State, or of the United States. It thus appears that when in the Corporation Court of the City of Radford, Virginia, the constitutionality of Section 1294H of the Code of Virginia was attacked, the party injured by a judgment upholding the constitutionality of the said Section of the Virginia Code could have redress by having the judgment reviewed in the Supreme Court of Appeals of the State. At least the party claiming so to be injured has under this provision of the Constitution of Virginia a right to invoke the aid of the Supreme Court of Appeals of the State, even though it is discretionary with the Supreme Court of Appeals of the State, or the Judges constituting the same, whether or not it or they shall grant a writ of error.

And where there is a discretionary right of review of a court by a higher court the record must show that the party has exhausted his efforts to obtain the benefits of such review before he can take the case up from the lower of the two courts. (Mullen *vs.* Beef Co., 173 U. S., page 116.)

This is true even though, as a matter of fact, it is a foregone conclusion that the higher court will act adversely, as in the case of second appeals on questions already settled. (See Great Western Telegraph Co. *vs.* Burnham, 162 U. S., 339.)

It may be contended by the plaintiff in error that the doctrine laid down in a similar case, viz., The Western Union Telegraph Company *vs.* Reynolds, 100 Va., 459, where the

Supreme Court of Appeals of Virginia declared the statute in question in this court constitutional, and which doctrine was reaffirmed in the case of the Western Union Telegraph Company *vs.* Hughes, 104 Va., page 240, would rule this case, and that the Supreme Court of Appeals of Virginia would refuse a writ of error, and for that reason that the judgment complained of rendered by the Corporation Court of Radford, Virginia, was the judgment of the highest court in the State of Virginia, in which a judgment could be secured in this cause, but we think this contention in the light of the doctrine laid down in the Great Western Telegraph Company *vs.* Burnham would be untenable. The granting of the writ of error by the Supreme Court of Appeals of Virginia in the Reynolds case and the Hughes case, though in each case the law in question was declared constitutional, would justify an application to the Supreme Court of Appeals for a writ of error in this cause. It is true that the writ of error may possibly have been refused, or, if granted, a decision adverse to the interests of the plaintiff in error may have been rendered, but in either of these cases then the writ of error to this court could have been properly awarded, for the record would have shown that the aid of the highest court of the State having jurisdiction in such matters had been invoked, but, as it is, there is no thing in the record to show that the plaintiff in error took any steps to set aside the verdict of the Radford Court other than the motion to set aside the verdict, and for these reasons the defendant in error prays this honorable court that the writ of error be dismissed.

JAMES R. CATON,
Attorney for Defendant in Error.

WESTERN UNION TELEGRAPH COMPANY *v.* WILSON.

ERROR TO THE CORPORATION COURT OF THE CITY OF RADFORD, STATE OF VIRGINIA.

No. 65. Argued January 11, 1909.—Decided March 1, 1909.

To give this court jurisdiction under § 709, Rev. Stat., not only must a right under the Constitution of the United States be specially set up, but it must appear that the right was denied in fact or that the judgment could not have been rendered without denying it.

Where the constitutional right was not set up in the original plea, and the record does not disclose the reasons of the state court for refusing to allow a new plea setting up the constitutional right, and the record shows that the refusal might have been sufficiently based on non-Federal grounds, this court cannot review the judgment under § 709, Rev. Stat.

In the absence of action on the part of Congress a State may regulate the conduct of local delivery of telegraph messages after the interstate transit by wire is completed.

Where it does not appear in the record that a telegraph message between two points in the same State had to be transmitted partly through another State, except by a plea which the state court refused, on non-Federal grounds, to allow to be filed, no Federal question is involved and this court cannot review the judgment under § 709, Rev. Stat.

The facts are stated in the opinion.

Mr. Rush Taggart, with whom *Mr. John F. Dillon*, *Mr. George H. Fearons* and *Mr. Francis Raymond Stark* were on the brief, for plaintiff in error.

Mr. James R. Caton, for defendant in error, submitted.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action against the Telegraph Company, in two counts. The first alleges a failure to transmit a message from Graham, Virginia, to East Radford, in the same State, as

promptly as practicable. The second alleges a failure to deliver the message as promptly as practicable after its arrival at East Radford. Both seek to recover $100, under statutes of the State imposing a forfeiture of that sum in such cases to the sender of the dispatch. The declaration was filed in April, 1906. In June the defendant filed a demurrer and general denial by leave of court. On February 25 of the next year, when the case was about to be tried, the Telegraph Company offered a special plea that its only proper and regular route for transmitting the message was by the way of Bluefield, West Virginia, to Washington, in the District of Columbia, and thence, by relaying, to East Radford; that it did promptly dispatch the message from Graham to Washington, but by mistake sent it from Washington to Cincinnati, causing a delay; that the transmission of the message was interstate commerce, and that therefore the statute of Virginia, act of January 18, 1904, c. 8, § 5, as applied to the part of the transmission outside the State, was void. Constitution of United States, Art. I, § 8, cl. 3. The conclusion of the plea was that the plaintiff could not "recover the penalty in his declaration demanded," and the defendant prayed judgment. The court refused to allow the plea to be filed, and the defendant excepted. A trial followed, at which the plaintiff got a judgment. The errors assigned are that the court refused to allow the defendant to file the above plea, and that it rendered judgment for the plaintiff instead of for the defendant.

This case comes here from a state court, and, of course, therefore it must appear that a Federal question necessarily was involved in the decision before this court can take jurisdiction or undertake to reverse the judgment of a tribunal over which it has no general power. It is not enough that a right under the Constitution of the United States was specially set up and claimed. It must be made manifest either that the right was denied in fact, or that the judgment could not have been rendered without denying it. *DeSaussure* v. *Gaillard*, 127 U. S. 216; *Johnson* v. *Risk*, 137 U. S. 300; *Leathe* v. *Thomas*, 207 U. S. 93, 99. See also *Bachtel* v. *Wilson*, 204 U. S. 36.

The reasons which led the court to refuse leave to file the plea in this case do not appear. But it is apparent on the face of the record that there are at least two grounds on which it is possible that leave may have been denied before the Federal question was reached. The original demurrer and answer seem to have been late, as they were filed by leave of court. This plea was not offered until more than nine months after the declaration, when the case was called for trial. The circumstances are not disclosed, and it may be that the court, in its discretion, considered that it was unjust for the plaintiff to be called upon to meet a new and serious issue at the last moment. Again, the plea, although it only referred to the section of the statute upon which the first count was based, went, in terms, to the whole declaration, and prayed judgment. It clearly was bad as to the second count. In the absence of any action on the part of Congress, at least, it would not be denied that a State could regulate the conduct of local messengers when the transit by wire was over. *Western Union Telegraph Co.* v. *James*, 162 U. S. 650. It cannot be said that the second count was abandoned, for nothing of the sort appears, and the plea was offered before trial, so that the evidence was not in. If the plea was not good for all that it attempted to cover, it was bad altogether. It may be that if we were dealing with the judgment of a lower court of the United States we should think that there were sufficient grounds for looking through the form to the substance of what the pleader seems to have had most in mind, but when we are considering the action of a state court we cannot say that the local tribunal did not yield to an argument that Saunders would have deemed conclusive and that Gould or Stephen would have regarded as an end of the case. 1 Wms. Saund. 28; Gould Pl., 4th ed., § 104.

The first assignment of error falls for the reasons that we have stated, and the second falls with it. The second is that the court erred in rendering judgment for the plaintiff. But the delay was proved and as the plea was not admitted there was nothing to show that the message went outside the State.

Moreover the judgment was upon both counts. It is impossible to go further, and to pass upon the delicate question of constitutional law that was argued here.

Writ of error dismissed.